

1984 WL 249849 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

March 27, 1984

*1 The Honorable Jarvis R. Klapman
Member
House of Representatives
420-B Blatt Building
Columbia, South Carolina 29211

Dear Representative Klapman:

You have requested an opinion from this Office as to whether an individual serving simultaneously as a Highway Commissioner and as an employee of the South Carolina Department of Labor may be violating the dual office holding provisions of the Constitution of South Carolina. For the reasons set forth below, it is the opinion of this Office that the dual office holding provisions are not being violated in this instance.

[Article XVII, § 1A of the South Carolina Constitution](#) provides that ‘. . . no person shall hold two offices of honor or profit at the same time.’ For this provision to be contravened, a person concurrently must hold two public offices which have duties involving an exercise of some portion of the sovereign power of the State. [Sanders v. Belue](#), 78 S.C. 171, 58 S.C. 762 (1907). Other relevant considerations are whether statutes, or other such authority, establish the position, prescribe its tenure, duties or salary, or require qualifications or an oath for the position. [State v. Crenshaw](#), 274 S.C. 475, 266 S.E.2d 61 (1980).

One who holds the position of Highway Commissioner would be considered to hold an office for dual office holding purposes. The office is created by [Sections 57-3-210 and -220](#), Code of Laws of South Carolina (1976). A Commissioner is elected to the office by the joint legislative delegations within a given highway district. A Commissioner takes on oath, is issued a certificate of election by the Secretary of State, and is commissioned by the Governor. Compensation is provided for Commissioners by [Section 57-3-250 of the Code](#) and by Sections 121 and 137 of Act No. 151, 1983 Acts and Joint Resolutions. Powers and duties of the Highway Commission are specified in [Section 57-3-20 of the Code](#); the Commission appears to exercise a portion of the police power of the state, police power being one of the traditional powers of the sovereign. The conclusion that a Highway Commissioner would be an officer is consistent with prior Opinions of the Attorney General dated April 13, 1979 and January 26, 1970 (copies enclosed).

The other position in question is that of a Labor Conciliator with the Department of Labor. The position is not created by statute, and one who holds the position is not commissioned. No oath is required. A salary is paid, but there is no specified tenure. A review of the job description for Class Code 7245 (positions titled Labor Conciliator) does not reveal any exercise of a portion of the sovereign powers of the State; the position involves analysis of employer-employee relations, conciliation of labor disputes, consultation to employers and employees, and other labor-management related activities. The individual's work is subject to control and supervision. For these reasons, it is the opinion of this Office that the individual in question would be an employee of the Department of Labor rather than an officer. In this connection, the following from [Sanders v. Belue](#) is opposite: ‘Conversely, one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, is a mere employee.’ 78 S.C. at 174. See also, 1975 [Op. Atty Gen.](#) No. 4000, dated March 19, 1975. Because the individual in question holds only one office, the dual office holding prohibition is not being violated.

*2 The prohibition against dual compensation, expressed in Section 133 of Act No. 151, 1983 Acts and Joint Resolutions, is not being violated in this instance. This prohibition (unless approved by the Budget and Control Board) is inapplicable unless

one person is employed by two state departments or institutions. Since the individual in question is employed by only one state department, Section 133 does not apply. Section 137 of Act No. 151 would be applicable; the individual in question would not receive a per diem allowance while receiving a salary as a full-time State employee. Mileage and subsistence may be paid for attendance at Commission meetings, however.

In conclusion, it is the opinion of this Office that constitutional and statutory prohibitions against dual office holding and dual compensation are not being violated by an individual simultaneously serving as a Highway Commissioner and holding a position with the South Carolina Department of Labor as an employee.

Sincerely,

Patricia D. Petway
Staff Attorney

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